



California Fair Political Practices Commission

March 13, 1992

Honorable Mickey Conroy
Assemblymember, Sixty-Seventh District
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0001

Re: Your Request for Informal Assistance
Our File No. I-92-123

Dear Assemblymember Conroy:

This is in response to your letter requesting assistance regarding your responsibilities as the Assemblymember for the Sixty-Seventh District under the new conflict-of-interest provisions of the Political Reform Act (the "Act") applicable to Legislators.¹

Since your advice request refers to future decisions for which the facts are uncertain at this time, we are treating your request as one for informal assistance.² Please note, the Commission's advice is limited to the application of the law to the specific facts and circumstances surrounding a specific decision. Thus, please contact us for further advice should you have questions regarding specific decisions.

QUESTION

As vice-chair of the Assembly Utilities and Commerce Committee, under what circumstances will you have a conflict of interest pursuant to Section 87102.5 due to a trust established for your spouse and dependent children; the trust owns stock in

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

numerous business entities, including San Diego Gas & Electric Company, Southern California Edison, and the Southern California Power Authority.

CONCLUSION

Investments held in trust for your dependent children, including investments in utilities, are considered your indirect economic interests. However, you will not be subject to administrative penalties for making, participating in making, or using your official position to influence decisions affecting those utilities unless (1) the decision is one specified in Section 87102.5 and (2) the decision will have a material financial effect on the utility distinguishable from its effect on the public generally.

FACTS

You are the vice-chair of the Assembly Utilities and Commerce Committee. Your spouse controls a trust for her benefit and the benefit of your dependent children. The trust has numerous business holdings, including investments in San Diego Gas & Electric Company, Southern California Edison, and the Southern California Power Authority. You stated that you have no interest in the trust, nor are you a trust beneficiary.

ANALYSIS

Conflicts of Interest, Generally

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

Section 87103 specifies that an official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on certain specified economic interests.

Thus, all public officials, including members of the Legislature, will have a conflict of interest in any decisions which will have a reasonably foreseeable material financial effect on their economic interest. (See generally, Isenberg Advice Letter, No. I-89-343.)

The Act provides for civil, criminal, and administrative penalties for violations of the conflict-of-interest provisions of the Act. Members of the Legislature, however, are only subject to administrative penalties, and the penalties may be imposed for violations of the conflict-of-interest provisions only in connection with the decisions specified in Section 87102.5.

The Ethics Bill

Effective January 1, 1991, the Legislature enacted statutes which impose administrative penalties on members of the Legislature applicable to certain specific decisions³ if the decisions violate conflict-of-interest laws. Section 87102.5 provides:

(a) The remedies provided in Chapter 3 (commencing with Section 83100) shall apply to any Member of the Legislature who makes, participates in making, or in any way attempts to use his or her official position to influence any of the [specified] governmental decisions in which he or she knows or has reason to know that he or she has a financial interest....

1. Economic Interests

An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that a decision will have a material financial effect, distinguishable from its effect on the public generally,⁴ on the official or a member of his or her immediate family or certain specified economic interests. Section 87103 sets forth economic interests that are recognized by the Act as follows:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on

³ The Act does not preclude an official from holding any appointed position or elected office due to economic interest, but would only required disqualification where a specific decision would have a material financial effect on the economic interest.

⁴ Regulation 18703 provides an exception to the conflict-of-interest provisions of the Act if the effect of the decision on the official's economic interest is not distinguishable from the effect on the public generally. For the "public generally" exception to apply, a decision must affect the official's interests in substantially the same manner as it would affect a significant segment of the public. These terms have been further refined in Section 87102.6, set forth on page 6 of this letter.

terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

You have asked specifically about business investments held in a trust controlled by your spouse. Pursuant to Section 87103, you will have an indirect interest in any business and real property owned by your spouse. This would apply to such assets held by a trust as well. (McAndrews Advice Letter, No. A-91-403.)

2. Is the Decision Specified in Section 87102.5?

In addition, a member of the Legislature is only subject to conflict of interest penalties if the decision is one that is specified in Section 87102.5. That section refers only to the following types of decisions:

(1) Any state governmental decision, other than any action or decision before the Legislature, made in the course of his or her duties as a member.

(2) Approval, modification, or cancellation of any contract to which either house or a committee of the Legislature is a party.

(3) Introduction as lead author of any legislation that the member knows or has reason to know is nongeneral legislation.

(4) Any vote of a legislative committee or subcommittee on what the member knows or has reason to know is nongeneral legislation.

(5) Any roll call vote on the Senate or Assembly floor on an item which the member knows is nongeneral legislation.

(6) Any action or decision before the Legislature in which all of the following occur:

(A) The member has received any salary, wages, commissions, or similar earned income within the preceding 12 months from a lobbyist employer.

(B) The member knows or has reason to know the action or decision will have a direct and significant financial impact on the lobbyist employer.

(C) The action or decision will not have an impact on the public generally or a significant segment of the public in a similar manner.

(7) Any action or decision before the Legislature on legislation that the member knows or has reason to know will have a direct and significant financial impact on any person, distinguishable from its impact on the public generally or a significant segment of the public, from whom the member has received any compensation within the preceding 12 months for the purpose of appearing, agreeing to appear, or taking any other action on behalf of that person, before any local board or agency.

Thus, with respect to all other decisions, you can not have a conflict of interest pursuant to Section 87102.5 of the Act. Please note that, subdivisions (a)(3), (4) and (5) of Section 87102.5 apply only to conduct with respect to nongeneral legislation. Legislation is only nongeneral if both of the following apply: (1) it must be reasonably foreseeable that the legislation will have a direct and significant financial impact on one or more identifiable persons, or one or more identifiable pieces of real property; (2) it must not be reasonably foreseeable that the legislation will have a similar impact on the public generally or on a significant segment of the public. (Section 87102.6(a).)

Section 87102.6(b) defines these terms. Section 87102.6(b) provides, in pertinent part:

(2) The term "public generally" includes an industry, trade, or profession.

(3) Any recognized subgroup or specialty of the industry, trade, or profession constitutes a significant segment of the public.

(4) A legislative district, county, city, or special district constitutes a significant segment of public.

(5) More than a small number of persons or pieces of real property is a significant segment of public.

(6) Legislation, administrative action, or other governmental action impacts in a similar manner all members of the public, or all members of a significant segment of the public, on which it has a direct financial effect, whether or not the financial effect on individual members of the public or the significant segment of the public is the same as the impact on the other members of the public or the significant segment of the public.

3. Foreseeability and Materiality

It would appear that it is foreseeable that many of your decisions as vice-chair of the Assembly Utilities and Commerce Committee may have some financial effect on the businesses in question. Of course, whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the specific facts of a particular decision.⁵

However, for your economic interest in a decision to be disqualifying, the financial effect of the decision must also be material. The standard for materiality differs depending on whether the business in which you have an investment interest is directly or indirectly involved in the decision.

⁵ An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

A. Direct Involvement

Generally, if the business is directly involved in a decision, the effect is deemed to be material. A business entity is directly involved in a decision before the Legislature when the business initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; is a named party in, or the subject of, the proceeding. A business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the business entity. It would appear that in most cases business entities will be indirectly involved in the decisions on the Assembly Utilities and Commerce Committee.

If a utility in which you have an interest was to initiate a proceeding before your committee, the Act provides a different standard of materiality for businesses if the businesses have stock traded on the New York or American Stock Exchange, or listed on the National Association of Securities Dealers National Market List. The effect of the decision on these businesses is material if they initiate the proceeding and the official has an investment in the business of \$10,000 or more.

B. Indirect Involvement

If the business is not directly involved in the decision, or the effect of the decision under the direct involvement analysis is not considered material, you may still be required to disqualify yourself if the indirect effect of the decision on the business is material. Indirect effects on a business interest may be a more common concern since most of the decisions you will be involved in appear to be rules of general application.

Regulation 18702.2 provides different thresholds of materiality for the following:

1. Business entities listed on the New York Stock Exchange or the American Stock Exchange, or business entities on the Fortune Magazine Directory of the 500 largest U. S. industrial corporations or the 500 largest U. S. nonindustrial corporations. (Regulation 18702.2(a) and (d).)

2. Business entities listed on the National Association of Securities Dealers National Market List or any business entity with net tangible assets of at least \$18,000,000 and pre-tax income for the last fiscal year of at least \$2,500,000. (Regulation 18702.2(b) and (e).)

3. Business entities not fitting the requirements of (a) or (b) but which are listed on the Pacific Stock Exchange or qualify for public sale in California and are listed on the Eligible Securities List maintained by the California Department of Corporations. Or, business entities with net tangible assets of at least \$4,000,000, and had pre-tax income for the last fiscal year of at least \$750,000, with net income from that period of at least \$400,000. (Regulation 18702.2(c) and (f).)

4. For any business entity not covered in one of the categories set forth above, Regulation 18702.2(g) governs.

For example, Regulation 18702.2(a) provides that for a business entity which is listed on the Fortune Magazine Directory of the 500 largest U.S. Industrial Corporations, that the effect of a decision is material if:

(1) The decision will result in an increase or decrease to the gross revenues for a fiscal year of ... \$1,000,000 or more; or

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of ... \$250,000 or more; or

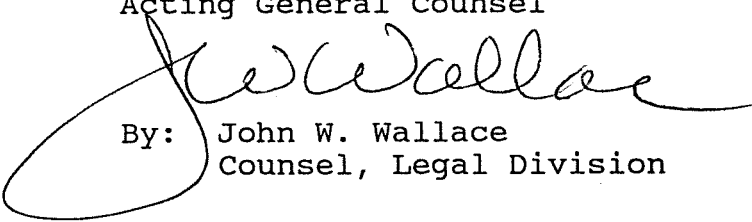
(3) The decision will result in the increase or decrease in the value of assets or liabilities of ... \$1,000,000 or more.

Thus, if subdivision (a) is the applicable provision, the effect of a decision which could foreseeably increase or decrease the gross revenues, assets or liabilities of the business by \$1,000,000 or more, or increase or decrease expenses by \$250,000 of one of the businesses would be material.

I trust this letter has addressed your concerns. Should you have any further questions regarding this matter or a specific decision that you would like advice on, please feel free to contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel

By:  John W. Wallace
Counsel, Legal Division

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